STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 22, 2005
v	No. 255130 Saginaw Circuit Court
ERNEST JENE PEOPLES, Defendant-Appellant.	LC No. 02-022538-FH

Before: Sawyer, P.J., and Talbot and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for felonious assault, MCL 750.82, assault and battery, MCL 750.81, and assaulting, resisting, or obstructing a police officer, MCL 750.81d(1). He was acquitted of an additional count of felonious assault and one count of domestic assault, second offense, MCL 750.81(3). This prosecution stems from a domestic dispute involving defendant and his eldest son. Defendant was sentenced to ten days in jail, six months' electric monitoring service, community service, and eighteen months' probation. We affirm.

Defendant argues that he was denied his rights to due process and a fair trial because the prosecutor improperly withheld evidence regarding his son's criminal record, which defendant asserts was both exculpatory and impeachment evidence. We disagree. Because defendant raised this issue for the first time on appeal, it is unpreserved and is reviewed for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Reversal is warranted only if the error resulted in the conviction of an innocent defendant or the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *People v Taylor*, 252 Mich App 519, 523; 652 NW2d 526 (2002).

In *People v Lester*, 232 Mich App 262, 281-283; 591 NW2d 267 (1998), this Court set forth the test for when a criminal defendant is entitled to a new trial based on improperly withheld evidence:

> In order to establish a *Brady*[1] violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that he did not possess

[1] *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

> the evidence nor could he have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. *United States v Meros*, 866 F2d 1304, 1308 (CA 11, 1989), cert den 493 US 932; 110 S Ct 322; 107 L Ed 2d 312 (1989).
>
> . . . Undisclosed evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. [*United States v Bagley*, 473 US 667, 682; 105 S Ct 3375; 87 L Ed 2d 481 (1985)]; *People v Fink*, 456 Mich 449, 454; 574 NW2d 28 (1998). A "reasonable probability" is "a probability sufficient to undermine the confidence in the outcome." *Bagley*, *supra*. Accordingly, undisclosed evidence will be deemed material only if it "could reasonably be taken to put the whole case in such a different light as to undermine the confidence in the verdict." [*Kyles v Whitley*, 514 US 419, 435; 115 S Ct 1555; 131 L Ed 2d 490 (1995)]. In determining the materiality of undisclosed information, a reviewing court may consider any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case. *Bagley*, *supra* at 683.
>
> In general, impeachment evidence has been found to be material where the witness at issue supplied the only evidence linking the defendant to the crime or where the likely effect on the witness' credibility would have undermined a critical element of the prosecutor's case. In contrast, a new trial is generally not required where the testimony of the witness is corroborated by other testimony or where the suppressed impeachment evidence merely furnishes an additional basis on which to impeach a witness whose credibility has already been shown to be questionable. *United States v Payne*, 63 F3d 1200, 1210 (CA 2, 1995), cert den 516 US 1165; 116 S Ct 1056; 134 L Ed 2d 201 (1996).

Defendant has not established a *Brady* violation in this case because he has not shown that he could not have obtained the information himself with reasonable diligence. *Lester*, *supra* at 281. Indeed, the fact that defendant touched on his son's criminal history during cross-examination of the son indicates that defendant was aware, at least in part, of his son's criminal history. Assuming that defendant was not aware of his son's full criminal record, defendant's partial knowledge alerted him to the possibility that his son had an undisclosed criminal past. Defendant could have himself easily obtained information about his son's criminal history from the local clerk's office. Further, no reasonable probability exists that the outcome of the proceedings would have been different had the information been disclosed by the prosecution. *Id*. at 282. Indeed, defendant was acquitted of the domestic assault charge, which was the only charge to which such evidence was relevant.

Defendant also argues that trial counsel was ineffective in the following ways: (1) failing to investigate into the criminal record of defendant's son as well as the contact between one of the arresting officers and defendant two weeks before the incident; (2) failing to adequately cross-examine defendant's son and one of the arresting officers about alleged errors and inconsistencies in their testimony; and (3) failing to challenge the competency of defendant's son

to testify. After considering each alleged error in context, we conclude that they involve matters of trial strategy, and this Court will not substitute its judgment for that of trial counsel regarding matters of trial strategy. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

As for defendant's first alleged instance of ineffective assistance, we have already noted that defendant was not convicted of the one charge brought to which defendant's son's criminal record was relevant. With respect to counsel's alleged failure to note the inconsistency in defendant's son's testimony regarding possession of a key to defendant's house, defendant has failed to show that he received ineffective assistance. The son did testify that defendant removed the key from the boy's jacket on the day in issue, while later testifying that he did not have his keys at the time because they had been held for some extended period of time by the police. However, this latter testimony came in response to a question posed by defense counsel ("I take it you didn't have a key on December the 1st?"). Thus, it was defense counsel's actions that elicited the inconsistent testimony. Further, the prosecutor's follow-up examination of the son only served to highlight the inconsistency:

> *Q.* I want to make sure I understand what you said about the key to the house on the date of December 1st when your dad got arrested. You had a key to that house on a ring that the police took from you that night?
>
> *A.* No.
>
> *Q.* Okay. . . . When did they take that from you?
>
> *A.* They – they took that from me –
>
> *Q.* Before or after December 1st?
>
> *A.* Before. Way before that . . . .
>
> *Q.* And so your dad didn't take your key to the house away from you?
>
> *A.* No.

Because the inconsistency was put squarely before the jury during re-direct, defendant is unable to establish the requisite prejudice.

Defendant also cites counsel's failure to properly examine a police officer regarding his testimony that both defendant and his ex-wife had called police about problems with defendant's son during recent years. Defendant characterizes this testimony as perjurious because the couple had not lived together since their divorce in 1993. Assuming the accuracy of the factual assertion, it does not necessarily follow that the mother could not have been in contact with the police because the parties had not lived together. Certainly she could have called from her own residence with concerns about her son who lived at a different residence. And even if the officer's testimony carries an implication that she did call from defendant's residence, the fact that the parties had not lived together does not mean that she could not have been there from time to time. Indeed, defendant testified that his ex-wife was at his residence as recently as December 3, 2002.

As for challenging the competency of defendant's son to testify, "[u]nless the court finds . . . that the person does not have sufficient physical or mental capacity or sense of obligation to testify truthfully and understandably, every person is competent to be a witness . . . ." MRE 601. Here, there was nothing in the record to indicate that defendant's son could not testify truthfully and understandably. Additionally, the competency of defendant's son was explored on cross-examination when counsel elicited testimony that the boy has never been employed because he suffers from paranoid schizophrenia and outbursts. Defense counsel's decision to impeach a witness's competence on cross-examination rather than to directly challenge the competency of the witness is presumed to be sound trial strategy. *People v Flowers*, 222 Mich App 732, 737; 565 NW2d 12 (1997).

Moreover, even if trial counsel did err in his representation, defendant has not shown that a reasonable probability exists that the outcome of his trial would have been different but for the alleged errors. *People v Hoag*, 460 Mich 1, 5-6; 594 NW2d 57 (1999).

Affirmed.

/s/ David H. Sawyer
/s/ Michael J. Talbot
/s/ Stephen L. Borrello